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ALEXANDER L. STEVAS,
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No. 83-651

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Federal Communications Commission,

Appellant,

v.

League of Women Voters of California,
Pacifica Foundation, Henry A. Waxman,

Appellees.

On Appeal from the
United States District Court
for the Central District of California

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees League of Women Voters of California, Pacifica Foundation, and Henry A. Waxman respectfully move to dismiss the appeal herein on the grounds that appellants have neither the standing

nor a valid jurisdictional basis for the instant appeal.

Opinions Below

The opinion of the District Court on the merits is reported at 547 F.Supp. 379 (C.D. Cal. 1982) and is reprinted in Appendix A to the Jurisdictional Statement in Case No. 82-912. (J.S. App. 1a-20a.) The orders that are the subject of the instant appeal are unreported, but may be found in Appendices A and C of the Jurisdictional Statement in this case. (J.S. App. 1a-3a, 6a-17a.)

Questions Presented

1. Whether a party may invoke this Court's jurisdiction under 28 U.S.C. § 1252 to appeal directly from an order of the District Court that does not hold an Act of Congress unconstitutional, but merely grants the appellant all the

relief it had requested by denying the opposing party's request for an award of attorneys' fees?

2. Whether a party's notice of appeal from an order of the District Court denying attorneys' fees to its prevailing opponent can cure the jurisdictional defect resulting from the appellant's failure to file a timely notice of appeal from an adverse decision on the merits more than a year earlier?

Statement

In this action, appellees brought suit against the Federal Communications Commission (FCC), challenging the constitutionality of the provision of 47 U.S.C. § 399 that prohibits editorializing by noncommercial broadcasting stations that receive grants from the Corporation for Public Broadcasting. On August 5, 1982, the District Court granted summary

judgment in favor of appellees and issued an order (1) declaring the editorializing ban unconstitutional as a violation of the First Amendment, (2) enjoining appellant FCC from enforcing or executing the editorializing prohibition, and (3) providing that appellees "shall recover their costs and reasonable attorneys' fees." (J.S. App. 4a-5a.) The order was entered the next day on August 6, 1982.

On August 16, 1982, the FCC filed a timely Motion to Alter or Amend the Judgment pursuant to Fed. R. Civ. P. 59(e), on the ground that any award of attorneys' fees was barred by sovereign immunity because it was not made in accord with the procedures or limitations of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (See Motion to Dismiss or Affirm in Case No. 82-912, App. 3a-4a.) On September 3, 1982, while its motion to alter or amend was still

pending before the District Court, the FCC filed a notice of appeal to this Court. (See Case No. 82-912, J.S. App. 23a.) That appeal was eventually docketed on December 1, 1982 as Case No. 82-912.

In the meantime, back in the District Court, appellees filed on September 7, 1982, an Application for Award of Costs and Reasonable Attorneys' Fees, as required by the EAJA. In addition, appellees responded to the FCC's motion to alter or amend by filing an opposing memorandum of points and authorities on October 4, 1982. In those papers, appellees argued that they were entitled to an award of reasonable attorneys' fees under the provisions of the EAJA and that the District Court had simply recognized as much in its Summary Judgment order by announcing its intention to award such fees upon proper application.

On November 1, 1982, appellant's motion to alter or amend and appellees' application for an award of attorneys' fees came on for hearing before the District Court. At the outset of that hearing, the Court disposed of appellant's Rule 59(e) motion, granting the relief requested by striking the award of fees from its previous judgment. As the District Court subsequently described those proceedings:

> At oral argument the Court indicated that the award of attorneys' fees was inadvertently included in the August 6, 1982 order. Such an award was not appropriate in that plaintiffs [appellees] had not applied for such an award at that time as required by 28 U.S.C. § 2412(d)(1)(B). The Court, therefore, orally ordered the award of attorneys' fees stricken from the judgment pursuant to F. R. Civ. P. 60. The Court then proceeded to hear plaintiffs' application, treating defendants' papers in support of its motion to alter or amend the judgment as papers in opposition to plaintiffs' application.

Order Denying Plaintiffs' Application for an Award of Attorneys' Fees, filed July 11, 1983. (J.S. App. 6a-7a.)[1/]

Because the FCC did not file any notice of appeal to this Court within 30 days from the District Court's disposition of its motion to alter or amend, appellees raised that apparent jurisdictional defect by moving to dismiss the appeal in Case No. 82-912. As appellees explained in their Motion to Dismiss or Affirm, filed January 20, 1983, the FCC's purported notice of appeal was premature and hence ineffective under Supreme Court Rule 11.3 and Griggs v. Provident Consumer Discount Co., ___ U.S. ___, 103 S.Ct. 400 (1982), inasmuch as its motion

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[1/] As the District Court's Minute Order entered on November 1, 1982 reflects, the Court then took appellees' application for an award of attorneys' fees under submission. (J.S. App. 18a.)

to alter or amend (which was still under consideration at the time) had suspended the finality of the District Court's judgment. Because "the requirement of a timely notice of appeal is 'mandatory and jurisdictional'" (id. at 403) (quoting Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978)), appellees argued that the FCC's failure to have filed a valid notice of appeal within the 30-day period prescribed by 28 U.S.C. § 2101(a) seemingly deprived this Court of jurisdiction. On February 28, 1983, this Court postponed further consideration of the question of jurisdiction in Case No. 82-912 to the hearing on the merits. The briefs have now been filed in that case, and the parties are awaiting the scheduling of oral argument.

Finally, on July 11, 1983, the District Court issued its Order Denying Plaintiffs' [Appellees'] Application for

an Award of Attorneys' Fees. (J.S. App. 6a-17a.)[2/] The court ruled that appellees' request for fees must be denied because the FCC's "decision to defend the statute served some legitimate, reasonable ends" and because an award of attorneys' fees would be unjust under the special circumstances of this case. (Id. at 16a-17a.) Believing that the District Court had overlooked an alternative ground for an award of fees under the EAJA, appellees then filed a timely Motion to Alter or Amend under Rule 59(e). On August 25, 1983, the District Court denied that motion, as well, and reaffirmed its initial decision denying appellees' application for attorneys'

[2/] The District Court had taken that application under submission at the conclusion of the November 1, 1982 hearing. See note 1, supra.

fees. (See Order Denying Plaintiffs' [Appellees'] Motion to Alter or Amend, J.S. App. 1a-3a.) On September 6, 1983, however, the FCC -- which had been the prevailing party on both the attorneys' fees application ruling and the subsequent Rule 59(e) motion -- filed a notice of appeal to this Court from those orders, purportedly pursuant to 28 U.S.C. § 1252. (J.S. App. 19a-20a.) That appeal was docketed on October 18, 1983, and appellant's Jurisdictional Statement was received by appellees on October 21, 1983.

ARGUMENT

1. As the FCC's notice of appeal makes clear, the instant appeal has been taken from the District Court's Order Denying Plaintiffs' Application for An Award of Attorneys' Fees. (J.S. App. 19a-20a.) The jurisdiction of this Court is invoked solely under 28 U.S.C. § 1252.[3/] However, because the District Court in its order granted appellant all the relief it had requested, there is plainly no basis for the FCC's appeal

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[3/] That statute provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies . . . is a party.

28 U.S.C. § 1252.

from that decision. Moreover, because the District Court's order can by no stretch of the imagination be read as "holding an Act of Congress unconstitutional," there is no basis for jurisdiction under 28 U.S.C. § 1252.

These points need not be belabored. The District Court's denomination of its order, its description in that opinion of both the prior proceedings and the issues currently under consideration, and the substantive discussion of those issues in the court's opinion, all confirm that the order that is the subject of this appeal involves only appellees' request for an award of attorneys' fees. As is also evident from the Court's order and opinion, the FCC received all the relief it had requested from the District Court when appellees' application for fees was denied. Thus, there is absolutely no basis for the instant appeal, for it is a

fundamental proposition that "the successful party below has no standing to appeal." Public Service Comm'n of Missouri v. Brashear Freight Lines, Inc., 306 U.S. 204, 206 (1939). Accord, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) ("A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); Gunn v. University Comm. to End the War in Vietnam, 399 U.S. 383, 390 n.5 (1970); Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939).

Furthermore, there is nothing in the order appealed from that even addresses the question of the constitutionality of an Act of Congress, much less that holds any Congressional act unconstitutional. That issue was resolved on November 1, 1982, when the District Court's initial

order of August 6, 1982 became final upon the disposition of appellant's motion to dismiss or affirm. Thus, the FCC's attempted reliance upon 28 U.S.C. § 1252 as the basis for jurisdiction in this Court is wholly without merit.[4/]

2. The FCC, in apparent acknowledgment that there is no basis for its appeal of the District Court's Order Denying Appellees' Application for an Award of Attorneys' Fees, concedes that the instant appeal was actually taken in a belated attempt to cure any possible

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[4/] Section 1252 also provides that "[a] party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court." That provision likewise offers no grounds for invoking this Court's jurisdiction, for the FCC did not receive, but instead gave notice of appeal under § 1252. In addition, the applicability of this provision to the "uniquely separable" issue of an award of attorneys' fees is highly questionable. See White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982).

jurisdictional defect in Case No. 82-912. According to appellant's reasoning, if its initial motion to alter or amend were to be held to have suspended the finality of the District Court's August 6, 1982 ruling on the merits (as appellees have suggested in Case No. 82-912), then "it must follow that the finality of the district court order holding Section 399 unconstitutional remained suspended until that court settled the question of attorneys' fees . . . ." J.S., at 5.

Appellant's argument, however, totally disregards the critical effect of the District Court's decision of November 1, 1982. As both the Minute Order of that date and the court's subsequent opinion denying appellees' request for attorneys' fees make clear, two distinct motions came before the District Court for hearing at that time: the FCC's Motion to Alter or Amend and appellees'

Application for Attorneys' Fees. At the outset of the hearing, the District Court granted all of the relief requested by appellant in its Rule 59(e) motion, amending the August 6 judgment by striking the award of attorneys' fees. At that point, the August 6 judgment became final. The District Court then proceeded to devote the remainder of the hearing to argument on appellees' separate Application for An Award of Attorneys' Fees, which was taken under submission and eventually denied nine months later, on July 11, 1983. There is thus no basis for appellant's assertion that the District Court's judgment on the merits was not final during the lengthy period in which the District Court was considering appellees' attorneys' fees

application.[5/]

The point that appellees seek to emphasize is simply that under no reasonable interpretation of this chronology of motions and decisions does the instant appeal validly raise the question that appellants seek to have reviewed by this Court -- whether 47 U.S.C. § 399's prohibition against editorializing violates the First Amendment. (See J.S., at i.) Whatever determination the Court may reach on the jurisdictional issue that is raised in Case No. 82-912, the

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[5/] The illogic of the FCC's reasoning becomes manifest when one realizes that according to appellant's argument, the judgment obtained in this or any other case would not become effective until the attorneys' fees issue was resolved, for until then, the decision on the merits purportedly would not be final. Such an incongruous result would mean that the prevailing party's counsel, by seeking such fees, would be delaying implementation of the relief that had just been obtained.

instant appeal is wholly without merit and can only be deemed frivolous. It is therefore appropriate to deter the filing of such appeals, and to compensate appellees for the time and resources expended in response thereto, by awarding them their costs and attorneys' fees. See 28 U.S.C. § 1912; Supreme Court Rules 49.2 and 50.7; Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Deming v. Carlisle Packing Co., 226 U.S. 102 (1912); Gullo v. McGill, ___ U.S. ___, 103 S.Ct. 2445, 2446 (1983) (memo) (statement of Burger, C.J., Rehnquist, J., and O'Connor, J.).

CONCLUSION

For the reasons stated above, appellees respectfully move this Court to dismiss the instant appeal and to award them their reasonable costs and attorneys' fees on appeal.

Dated: November 18, 1983.

Respectfully submitted,

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